

Pascual-Garcia v. Ashcroft, 02-71844

**AUG 06 2003**

KLEINFELD, Circuit Judge, dissenting:

**CATHY A. CATTERSON**  
**U.S. COURT OF APPEALS**

I respectfully dissent. This case turns on the standard of review. We may reverse the BIA decision where the evidence not only supports the contrary conclusion, but “compels” the contrary conclusion that Pascual-Garcia was persecuted because of his political opinion.<sup>1</sup> No one should have to witness his father’s murder, but I respectfully disagree with the majority that Reyes statement “compels” a finding that Pascual-Garcia has met his burden of establishing persecution of himself (as opposed to his father) because of his political opinion.

There is no evidence in the record that Pascual-Garcia had any political opinion of his own when his father was murdered or when he left Guatemala. While Reyes’s threat to Pascual-Garcia “that if I, uh, turned him over or that if I told anybody that he was a guerrilla man that he was going to kill me”<sup>2</sup> might support the inference that Reyes imputed the father’s political opinion onto his eleven year old son, Reyes’s threat certainly does not compel such a finding.

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<sup>1</sup> INS v. Elias-Zacarias, 502 U.S. 478, 481 n.1 (1992), Singh v. INS, 134 F.3d 962, 966 (9th Cir. 1998).

<sup>2</sup> A.R. at 309.

Rather, it is perfectly reasonable to conclude that Reyes threatened Pascual-Garcia to keep Pascual-Garcia – a witness to the murder – quiet. Given this reasonable interpretation of the threat, I cannot agree that the record compels a conclusion that Pascual-Garcia was threatened on account of an imputed political opinion.<sup>3</sup> Even if his father’s murderer had threatened Pascual-Garcia because he imputed a pro-government political opinion to the eleven year old boy, the evidence does not permit an inference that he faces a risk of persecution on account of his opinion if he returns. There is no reason evident from the record why he must return to the same village, or that his father’s murderer is still there. And if he does, he is now twenty-two, not eleven. He is likely to recognize the murderer much more easily than the murderer can recognize him.

Because Pascual-Garcia has not presented evidence “so compelling that no reasonable factfinder could find”<sup>4</sup> that Pascual-Garcia has not established past

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<sup>3</sup> Molina-Estrada v. INS, 293 F.3d 1089, 1094-95 (9th Cir. 2002) (holding in the withholding of removal context that the factual record did not compel a finding of imputed political opinion where the alien’s father, a member of the Guatemalan National Order fighting the guerrillas, was killed in a guerrilla bombing of his home and where the guerillas then called his remaining family members and threatened them).

<sup>4</sup> Singh, 134 F.3d at 966 (citing Elias-Zacarias, 502 U.S. at 483-84).

persecution, no remand is necessary to allow the INS to rebut the presumption of a well-founded fear of future persecution. On this record, Pascual-Garcia's petition should be denied.<sup>5</sup>

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<sup>5</sup> Molina-Estrada, 293 F.3d at 1095.